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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 331

SAMUEL KLAPHOLZ, PETITIONER

v.

P. A. ESPERDY, AS DISTRICT DIRECTOR FOR THE NEW YORK DISTRICT, IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (R.[1] 64-66; Pet. App. 11-12) is reported at 302 F. 2d 928. The opinion of the district court (R. 49-63) is reported at 201 F. Supp. 294. The opinion of the

[1] "R." refers to the printed record, consisting of the Appendix to the petitioner's brief in the court of appeals and the proceedings in that court.

Attorney General appears at R. 42-48. The opinions of the Board of Immigration Appeals appear at R. 3-12, 13-31, 32-41.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1962 (R. 67-68; Pet. App. 13-14). The petition for a writ of certiorari was filed on August 14, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an alien applicant for admission to the United States, whom the Attorney General temporarily paroles into the United States under Section 212(d)(5) of the Immigration and Nationality Act, may thereafter be excluded as an alien convicted before entry of a crime involving moral turpitude, on the basis of a conviction occurring during the parole period for an offense against the United States committed prior to his arrival.

STATUTES INVOLVED

Section 212 (a)(9) of the Immigration and Nationality Act, 66 Stat. 182, 8 U.S.C. 1182(a)(9), provides in pertinent part:

> SEC. 212. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * * * *

> (9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense), or aliens who admit having committed such a crime, or aliens who admit committing acts which constitute the essential elements of such a crime; * * *

* * * * *

Section 212(d)(5) of the same Act, 66 Stat. 188, 8 U.S.C. 1182(d)(5), provides:

> (5) The Attorney General may, in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

STATEMENT

The pertinent facts are not in dispute and may be summarized as follows:

Petitioner is a 46-year-old alien, a native and citizen of Germany. He was first admitted to the United States, for permanent residence, in July 1947, but he subsequently lost his resident status by leaving the country and remaining abroad for longer than

the permissible period. His last departure—his fourth since his original entry—was in November 1950. In March 1956, he was granted a non-quota immigrant visa by the United States Consular Office in Germany on the basis of the United States citizenship of his wife, who had remained in this country and had in the meantime been naturalized, and on July 30, 1956, in possession of this visa, he presented himself for admission at the port of New York aboard the S.S. *United States*. (R. 4, 33, 42, 50; Pet. 2.)

Prior to his arrival, an investigation had been conducted by the customs and immigration authorities which implicated petitioner in large-scale diamond-smuggling. His brother and sister-in-law, who were charged as co-conspirators with him in these activities, had been arrested on August 4, 1954. Petitioner knew of their arrests at the time of his arrival, and he was also aware that charges were pending against him. (R. 42-43, 50.)

In the course of petitioner's shipboard inspection, the immigrant inspector, finding petitioner's name in a "Look Out" book, deferred further examination and telephoned the United States Attorney for the Eastern District of New York. A short while later a representative of the office of the United States Marshal for that district boarded the ship, took petitioner into custody, and lodged him in the Federal House of Detention in New York City, to await further action by the United States Attorney. (R. 4, 14, 33, 50.)

On August 27, 1956, petitioner was informed by the Immigration and Naturalization Service that he

was paroled into the United States pursuant to Section 212(d)(5) of the Immigration and Nationality Act (*supra*, p. 3), "pending completion of primary inspection" (R. 14, 33, 43, 50).[2]

On October 29, 1956, petitioner pleaded guilty in the Eastern District of New York to an information charging him with having knowingly, and with intent to defraud the United States, caused, commanded and procured the smuggling into the United States, on August 2, 1954, of cut and polished diamonds worth $243,810, in violation of Sections 2 and 545 of Title 18 of the United States Code. On December 17, 1956, he was sentenced for this offense to 15 months' imprisonment. (R. 4, 33, 43, 51.)

On January 23, 1957, a special inquiry officer of the Immigration and Naturalization Service conducted a hearing on the question of petitioner's admissibility to the United States at the Federal Correctional Institution, Danbury, Connecticut, where petitioner was serving his sentence. On May 3, 1957, the officer found him inadmissible, under Section 212(a)(9) of the Immigration and Nationality Act (*supra*, pp.

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[2] In petitioner's administrative file there appears the Form I-122 ("NOTICE TO ALIEN DETAINED FOR HEARING BY SPECIAL INQUIRY OFFICER"), dated August 2, 1956, and a copy of a letter dated August 3, 1956, to the Warden of the Federal House of Detention requesting that the form be given to petitioner (R. 4-5, 50-51). Petitioner claimed in the exclusion proceedings that he did not receive this form, and that the first time he received such a form was on December 19, 1956 (R. 5, 51). The special inquiry officer apparently made no determination as to when petitioner first received this formal notice. In our view, the date is immaterial.

2-3), as an alien who had been convicted prior to entry of a crime involving moral turpitude, *viz.*, the smuggling offense for which he was then serving his sentence. (R. 4, 5, 43, 51.)[3]

On appeal by petitioner to the Board of Immigration Appeals, the Board, being of the view that the question of petitioner's excludability had to be determined "as of the date of his application for admission—July 30, 1956" (R. 11), reversed the order of the special inquiry officer and directed that petitioner be admitted (R. 3-12). On motion by the Service for reconsideration, the Board adhered to its decision (R. 13-31; see also R. 32-41). The Attorney General reversed the order of the Board and reinstated the decision of the special inquiry officer (R. 42-48).

Petitioner thereafter petitioned the United States District Court for the Southern District of New York for a declaratory judgment holding him admissible. The district court granted a motion by respondent for summary judgment and dismissed the petition

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[3] The special inquiry officer subsequently reopened the hearing to permit petitioner to apply for waiver of excludability pursuant to Section 5 of the Act of September 11, 1957, 71 Stat. 640, 8 U.S.C. (Supp. III) 1182h (authorizing the Attorney General, in his discretion, to admit persons who are excludable on specified grounds, including those defined in Section 212(a)(9), where exclusion would result in hardship to a citizen spouse or child and admission would not be prejudicial to the national welfare, safety or security). At the reopened hearing, the requested waiver was denied. This aspect of the special inquiry officer's decision was subsequently sustained by the Board of Immigration Appeals (see R. 63), and is no longer is issue.

(R. 49-63). The court of appeals affirmed (R. 64-67; Pet. App. 11-14).

ARGUMENT

1. This case does *not* present the question whether exclusion of an alien may be based on post-entry, or post-application, conduct.[1] The offense which led to petitioner's exclusion had been consummated long before he applied for admission. The only issue here is whether the admission of an alien, who the competent authorities have good reason to suspect has already committed a disqualifying offense, may be deferred pending determination, by orderly legal process, of his actual guilt or innocence.

The Immigration and Nationality Act does not require an immediate, irrevocable ruling on admissibility the moment the alien presents himself for entry. On the contrary, in fairness to the applicant and to the public interest, the Act expressly provides for deferring decision in doubtful cases, without prejudice to the ultimate determination. See 8 U.S.C. 1222, 1223(a), 1224, 1225, 1226. The Act further provides for parole during this period of temporary indecision. 8 U.S.C. 1182(d)(5). But such parole "shall not be regarded as an admission of the alien"; he remains an "applicant for admission to the United States," *id.*, to the same extent as though detained

[1] Conviction of a crime involving moral turpitude committed within five years *after entry* is ground for *deportation*. 8 U.S.C. 1251(a)(1). Accordingly, there will normally be no occasion to invoke *exclusion* when criminal conduct follows entry.

at Ellis Island. See *Leng May Ma* v. *Barber*, 357 U.S. 185, 188-190; *Kaplan* v. *Tod*, 267 U.S. 228, 230. What, then, if, during this interval before admission, the alien admits to, or is convicted of, an offense involving moral turpitude committed before his arrival here? The Act, 8 U.S.C. 1182(a)(9), declares him excludable. Must the Service close its ears to the confession simply because it occurred after the alien *first* applied for entry? Such a result would defeat the purpose of the immigration laws. Nothing in the text requires it. On the contrary, the very section here invoked, 8 U.S.C. 1182(a)(9), obviously contemplates that the alien may admit his crime after his arrival and initial application. And no distinction is drawn between a subsequent confession and a subsequent conviction. It follows that petitioner, a confessed and convicted smuggler before entry,[5] was properly excluded.[6]

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[5] Since petitioner entered a plea of guilty to the charge of smuggling, his exclusion is supported by both an admission and a conviction.

[6] *Tulsidas* v. *Insular Collector of Customs*, 262 U.S. 258, cited by petitioner (Pet. 7), gives no support to his position. In that case, as noted by the district court (R. 61), this Court held merely that one who claimed exemption from exclusion as a "merchant" was required to have that status "at the time admission [was] sought" and that he could not rely on a "status to come or to be established" (262 U.S. at 261). The case involved no problem relating to parole and is not otherwise relevant.

We do not understand petitioner's contention (Pet. 8) with respect to the recent amendment to 8 U.S.C. (Supp. III) 1255(a) which permits the Attorney General to adjust the

2. Petitioner, to avoid this conclusion, argues that the immigration officials, in paroling him into the United States, acted beyond the scope of their authority, and, unwittingly, admitted him. The power of the Service to take such action is limited, he contends, to aliens who are inadmissible when they first seek entry (Pet. 4-9). The statute itself contains no such limitation, however. It authorizes the Attorney General, in his discretion, to parole into the United States temporarily, under such conditions as he may prescribe, "for emergent reasons or for reasons deemed strictly in the public interest," "any alien applying for admission to the United States." The legislative history of the section makes clear, moreover, that Congress specifically contemplated that the "reasons deemed strictly in the public interest," for which the power conferred was to be exercised, should include "purposes of prosecution" (S. Rep. 1137, 82d Cong., 2d sess., p. 13; H. Rep. 1365, 82d Cong., 2d sess., p. 52)—the very purpose for which parole was here used.[7]

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status of a parolee. As he says, the purpose of the provision is to permit the permanent entry of an alien, originally inadmissible, whose disqualification has since been removed. But it does not follow that the alien who becomes disqualified during his parole can be admitted.

[7] It is true, as petitioner points out (Pet. 5-6), that the committee reports, in commenting on the purpose of Section 212(d)(5), refer to the persons whose admission on parole the section authorizes as "inadmissible" and "otherwise inadmissible" aliens (S. Rep. 1137, 82d Cong., 2d sess., pp. 12-13; H. Rep. 1365, 82d Cong., 2d sess., p. 52). We submit, however, that these references in the committee reports are

At the time of petitioner's arrival, formal charges were outstanding accusing him of a serious offense against the United States. In these circumstances it was undeniably "in the public interest" for the Attorney General, acting under the broad authority given him by the statute, to parole him ashore in order that he might be prosecuted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

SEPTEMBER 1962.

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not sufficient to warrant the inference that the Attorney General's authority was intended by Congress to be limited to aliens who were inadmissible at the time of their initial applications for entry. If Congress had intended thus to circumscribe the Attorney General's power, it would have been easy enough to make the limitation explicit. It seems more likely that the committee reports, in the references relied upon by petitioner, were merely alluding to typical situations to which the parole power would apply.

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